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The determination of the applicable law in respect of cultural property-related disputes within the context of modern private international law

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Abstract

According to the statistics, provided in the research, hardly a week goes by without a new case reported in the press concerning the flagrant crimes committed in the respective field and the illicit trafficking of cultural values ranks third after trafficking in arms and drugs, that determines urgency of the research. Comprehensive scientific research of progressive development of the institution of international legal protection of cultural property taking into account current challenges in international relations, as well as a search for optimal ways of dispute resolution, concerning cultural values, shall be considered an object of the present scientific paper. Its methodological framework is rooted in both general scientific and special methods – the former gave us an opportunity to set limits on the research and detail conceptual construct, whereas the latter, for instance, comparative legal method and method of expert estimations, made it possible to determine the prospects for the development of the institution of international legal regulation of cultural property. As result of the study the following conclusions have been determined: cultural values often represent both private property and national cultural heritage, which reflects their «dual nature» and explains, why international legal regulation is fraught with a slew of difficulties and is so «painful». Moreover, the present scientific paper outlines that in comparison with lex rei sitae rule lex originis looks far more beneficial as resort to it will not only ensure the security of art and antiquities transactions, but will also bring much-needed transparency into the cultural property trade, and will decrease the theft and illegal excavation of art and antiquities. Also, the article discusses the perspectives of the establishment of a respective institutional arbitration body – arbitration center or a tribunal, as the optimal answer to challenge of time.

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Keywords

Cultural property, conflict of laws, domestic legislations, illicit trafficking, lex rei sitae, lex originis, good-faith purchaser, UNIDROIT Convention, supranational arbitration body.

Introduction

As one Carthaginian Warlord once said, «Aut viam inveniam aut faciam», which means «I will find the way, or I will make one» and is to date a good relevant expression given that the world around us keeps changing. The present article discusses the problematic and controversial issues and statutory instruments containing regulation of the latter relating to Private International Law, as well as provides a vision for the future of the conflict of laws, in the light of the theme designated by us herein - cultural property-related disputes involving a cross-border element. It should be also noted that the international court practice is analysed by the reference to a series of legal cases.

Main part

Illegal trade has always constituted the most widespread type of crimes, with art objects being titbits for thieves, tomb-raiders, forgers and inexperienced or unconscionable art-dealers. Regarding the disputes, arising from such a stream of commerce, Private International Law is notable for the following inherent difficulty: case decisions are defined in accordance with the way in which different countries «choose to allocate burdens, rights and responsibilities between two relative innocents: original owners and subsequent purchasers» [Fincham, 2009, 141]. This principle does not have international legal confirmation and is set forth primarily in domestic legislations, which is its crucial problem and the core aspect of the present article. In the countries of the continental legal tradition, which favour the protection of commercial transactions, good-faith purchasers have more privileged position than original owners, even in cases where the ownership title is obtained from a thief. This finds its reflection in application of lex rei sitae (lex situs) rule, under which the dispute is settled subject to law of the state, where the cultural heritage object is located at the time of the last transaction. It hardly needs saying that criminals tend to hide their transactions and shift the artefacts to favorable jurisdictions, protecting subsequent purchasers' rights and interests. By contrast, common law jurisdictions adhere to the principle «nemo dat quod non habet», which stands for «no one can transfer title on stolen property». The amount of cases, meanwhile, relating to illegal trafficking of pieces of art within the both legal systems has been growing year after year, calling for the answer to this challenge of time. Many scholars see it in the resort to lex originis, which is being more and more considered the way to impede the flow of illicit cultural values. Thus, «not only are the rules of Private International Law different from State to State, but they are also not tailored to lawsuits dealing with the delicate question of combating illicit trade of cultural property» [Chechi, 2017/2018, 284].

Let us remember the theft of an art object that represents for plenty of people an embodiment of culture – Leonardo da Vinci's Mona Lisa in 1911. The subsequent successful acquisition of this masterpiece in 1913 was based on two factors: firstly, «this case was easy to resolve, as the work was so valuable and famous that it was unmerchantable» [Fincham, 2009, 112]. Further, the reviewed background illustrates the practice that intrastate transactions, involving cultural objects, are primarily governed by the laws of only one jurisdiction, conferring the parties equal opportunities. This misappropriation of Gioconda being complexified by multiple jurisdictions, having different rules of law and hence providing different treatment of similar, one would think, cases, the outcome of the lawsuit would have been unpredictable. That is exactly what took place in respect of the legal proceedings, examined hereinafter.

The application of lex situs rule and its «side-effects» in cultural property-related cases are prominently presented in, for instance, the Winkworth case, where the dispute had arisen from

ownership of netsuke – tiny carved sculptures, which are specific for Japanese culture. Under the gist of the case, the collection, originally belonging to an English collector William Winkworth, was stolen from him and later smuggled to Italy. The miniatures' fate was later such that they were acquired by his counterpart, an Italian collector Paolo D'Annone. In 1977 the new owner decided to present the netsuke at Christie's auction, where the carved fishes, tigers and laughing Budais were accidently spotted by Winkworth. The miniatures' legal fate turned out to be more interesting: the English court seised of the matter did not accept Winkworth's position, suing at law, and, by virtue of the English conflict of laws rules and lex rei sitae, chose Italian law as applicable one. Eventually, the court held that Winkworth's title had been extinguished on the grounds that D'Annone was subsequent, but, what turned out to be crucial, good-faith purchaser under Italian jurisdiction.

By contrast, fundamentally different approach is demonstrated by common law courts and their priority given to lex originis. On this occasion, the Goldberg case, referred to as the benchmark, shall be focused on. The subject matter of the case was larceny and illicit removal of the unique Greek mosaics, depicting the Holy Apostles. These objects became in relation to these events known as "the Stolen Angels". The mosaics were taken from a Cypriot church and found a new owner, in the nature of things the bona fide one, in the person of an American art-dealer Peg Goldberg. The proceeding resulted in the restitution of the mosaics under Indiana state law, which was found governing by the court of law – without, curiously, even applying the law of the State that had the most evident cultural and historical connection to the mosaics and hence a truly legitimate claim – Cyprus.

We also find incredibly interesting another case, which more recently appeared on the horizon of the International Private law: the Budda Mummy case, the opposing parties wherein are the Chinese village committee and the Dutch art-collector. Thus, the merits of the case created an uncommon legal collision because the latter have illicitly transported not only a valuable cultural object, but a golden statue, containing human remains. The point is that for the locals the disputed statue was more than a few pounds of gold. They have been deprived of their relic. Neither the parties to the dispute, nor the international community have got the ruling of the court of law, but it hardly needs emphasizing that everything depends on the legal nature of the mummy, contained in the statue. Anyway, no person, including a good-faith purchaser, can own somebody else's corpse both in civil law and common law systems.

Traditionally, it is believed that simplicity, objectivity, transparency, legal certainty and ease of application have elevated the lex rei sitae rule to its dominant position. The question arises, since when does the ease of use overlap the fact that the title of the true owner is systematically ignored and extinguished? The opponents' of the reexamination of the established approach arguments, satisfied with lex situs, also sound unconvincing – «Indeed, in an ideal world, there should be no argument that the country of origin has the closest connection and the most legitimate claim to apply its own law in determining the ownership of objects comprising its cultural heritage…However, the fact that only twenty-three countries ratified or acceded to the UNIDROIT Convention serves as a reminder that we live in a world that is less than ideal» [Symeon, 2005].

Nevertheless, we sincerely believe that international efforts of facilitating the return of stolen or illicitly exported cultural objects to their country of origin are not doomed to be fruitless. After all – unique cultural heritage, contrary to any other disputed property, often represents not only private, but also public interest – relics are ripped out of archeological sites, stolen from museums, palaces and even churches. The objective to promote the preservation, protection and the return of illegally trafficked cultural treasures is shared in a range of international conventions and national legislations: Directive 2014/60/EU on the return of cultural property; Article 36 of the EU Treaty, defining the

notion of «national treasures»; The UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, etc. Regrettably, unbridled reign of lex rei sitae erases the efforts, laid down in these disparate legal instruments, to dust, whereas the international community lacks in the unified effective source of regulation. That is the reason why a number of scholars have argued that civilian jurisdictions should amend their choice of law rules to accommodate the common law view. Resort to lex originis will not only ensure the security of art and antiquities transactions, but «will also bring much-needed transparency into the cultural property trade, and will decrease the theft and illegal excavation of art and antiquities» [Reyhan, 2001]. Moreover, by virtue of the specific nature and special value of the cultural objects, the legislator shall be vocal about adoption of a unified international legal instrument, which would have dealt with the issues, including the transfer of ownership of cultural objects, development of their the updated classification, as well as the the determination of the applicable law in respect of cultural property-related disputes.

Nevertheless, we understand, without diminution of the ideas above, that have remained until now in theoretical plane, without any practically significant proposal, which would contribute to resolution of cultural property-related disputes, involving a foreign element. We tend to see the establishment of a respective institutional arbitration body as the most optimal and achievable measure, necessary in order to overcome the current problematic issues. Examples can be found of the following institutions – the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), the International Centre for Settlement of Investment Disputes, the International Tribunal for the Law of the Sea and other ones. The results of their activities, which have been achieved in recent years, demonstrate a high level of competence in considering disputes not only between states, individual citizens and legal entities, but also, which is especially important for us within the framework of the topic under study, when considering claims filed on behalf of the latter in address of a foreign country. The possibility of the parties, based on their own needs, to determine the arbitration court in which their disputes, arising, for example, in the field of international sale, investment or navigation, will be considered, at the same time, allows us to talk about the subsequent enforcement of the decisions made. The question arises, based on which document are we entitled to discuss the institution of this international arbitration body? According to Professor I. Gesas [Gegas, 1997, 158] and a number of other scientists [Sidorsky, 2010], the latter can be established on the basis of the UNIDROIT Convention of 1995, which we have repeatedly touched upon, Article 8 of which contains the following: «The parties may agree to refer their dispute to a tribunal or other competent body, or to arbitration». However, Article 20 authorizes the president of the International Institute for the Unification of Private Law to convene «a special committee to examine the actual functioning of this Convention». Even at the stage of development of the Convention, the advantages of resolving disputes related to cultural heritage objects through arbitration, such as the neutrality and professionalism of arbitrators, high-quality checks and examinations, saving time and material resources, were emphasized. In addition to the principle of impartiality, the work of this arbitration body, center or tribunal should also be based on the rule of stare decisis (Latin «to stand by the decision»), which contributes to the development of a uniform practice.

Conclusions

In summing up the present research, the following conclusions shall be noted. It is fair to use the notion «dual nature» regarding cultural values as they often represent both private property and national cultural heritage, strategically important for the states. The primary practical difficulty of their legal

regulation is determined by such a dichotomy, which lies in conflict of public-law and private-law interests, entailing the application of rules of not only public international law but also private international law. Fundamentally different approach to resolution of cultural property-related disputes within continental and common law legal systems, namely resort to lex rei sitae or lex originis and endless heated debates on the merits and demerits of these principles do not contribute to harmonization and developing of a uniform law enforcement practice. This objective may be achieved, in our view, by establishment of a new effective forum for the settlement of cultural property-related disputes such as the supranational jurisdictional body – for instance, arbitration center or tribunal. Besides that, due to attempts to strike a balance between a state and an individual, an original owner and a subsequent purchaser, which often refer to provisions of different legal systems, we are able to observe the formation of a new area of international law, which is being called «Cultural Heritage Law» in the modern doctrine. Meanwhile, the question of determination of the applicable law in respect of cultural property-related disputes still remains open.

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Определение применимого права в отношении споров, связанных с культурными ценностями, в рамках современного международного частного права

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Аннотация

Согласно статистике, приведенной в исследовании, не проходит и недели, чтобы в прессе не сообщалось о новых случаях совершения грубых преступлений в сфере незаконного оборота культурных ценностей, который занимает третье место после оборота оружия и наркотиков, что определяет актуальной данной темы. Предметом статьи являются комплексное научное исследование поступательного развития института международно-правовой охраны культурных ценностей с учетом современных вызовов международных отношений, а также поиск оптимальных путей разрешения споров, касающихся культурных ценностей. Методологическую базу составили как общенаучные, так и в специальные методы: первые дали возможность очертить рамки исследования и детализировать понятийный аппарат, тогда как вторые, например, сравнительно-правовой метод и метод экспертных оценок, позволили определить перспективы развития института международно-правовой защиты культурных ценностей. В результате исследования сделаны следующие выводы: культурные ценности зачастую представляют собой как частную собственность, так и национальное культурное наследие, что отражает их «двойственную природу» и объясняет, почему международно-правовое регулирование сопряжено с массой трудностей и столь «болезненно».. Кроме того, в статье подчеркивается, что, по сравнению с lex rei sitae, правило lex originis выглядит гораздо более выгодным, поскольку его применение не только обеспечит безопасность сделок с предметами искусства и древностями, но и внесет столь необходимую прозрачность в торговлю культурными ценностями и уменьшит кражи и незаконные раскопки произведений искусства и древностей. В статье также рассматриваются перспективы создания соответствующего институционального арбитражного органа – арбитражного центра или трибунала как оптимальный ответ на вызов времени.

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Ключевые слова

Культурные ценности, коллизионное право, национальное законодательство, незаконный оборот, закон места нахождения имущества, закон места происхождения, добросовестный приобретатель, Конвенция УНИДРУА, наднациональный арбитражный орган.

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